treated as mere surplusage not in any way affecting the meaning of the remainder of the sub-section.

Mr. Palasuntharam for the applicant cited the Privy Council decision in *Tan Chye Choo & Ors.* v. *Chong Kew Moi*[1] as authority for the proposition that mere breach of a statutory duty did not give the respondents a cause of action.

In delivering the judgment of the Board, Lord Morris of Borth-y-Gest said at page 4:—

"Guidance as to the principles to be applied in considering whether there is a right of action in a person who claims that he has been injured by reason of a breach of statutory duty is to be found in the speeches in *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398. Lord Simonds in his speech at p. 407 said:-

'The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted...'

Lord du Parq in his speech pointed out that in the preceding quarter of a century in cases where it was being considered whether there was a right of action resulting from a breach of statutory duty 'the debate has normally turned on the question whether the case before the court falls within the decision in *Groves* v. *Wimborne (Lord)* ([1898] 2 Q.B. 402) or that in *Phillips* v. *Britannia Hygienic Co. Ltd.* ([1923] 2 K.B. 832)'."

I would with respect say that, on a consideration of the Road Traffic Ordinance, 1958, and the circumstances including the pre-existing law in which it was enacted, their Lordships of the Privy Council held that *Tan Chye Choo's* case fell within the decision in *Phillips* v. *Britannia Hygienic Co. Ltd.*[2]

However, the statutory duty under the Employment Ordinance, 1955 is one where no remedy by way of penalty or otherwise for its breach is imposed so that a right of civil action would accrue to the person who is damnified by the breach. To paraphrase A.L. Smith L.J.'s remarks in *Groves* v. *Wimborne*[3] the Employment Ordinance, 1955 is a public Act passed in favour of the workers to compel their employers to do certain things for their protection and benefit. In other words, the principle in *Groves* v. *Wimborne* should be applied. In my opinion this principle applies even though the damage is only pecuniary.

Since the right of action exists, the respondents have a right to resort to the similar remedy afforded by section 69(1) of the Ordinance.

Days on which the respondents absented themselves with the approval of the applicant cannot, I think, be "rest days" as envisaged under section 59, and I would merely regard such period of leave as approved leave without pay.

The respondents had therefore worked without rest days for the period of 44 weeks. It is difficult in the circumstances to decide whether the respondents had worked on 44 rest days at their own request or at the request of the applicant, their employer.

There shall be no order on the motion.

In view of the claim at ordinary rate of pay for one day's work for each of such rest days, however, I would confirm the order of the Labour Officer, Seremban, that a sum of $3,366 being rest day pay at $6 per day for 44 days per person be paid to the respondents. I also award the costs here and that of the inquiry before the Labour Officer, Seremban, to the respondents.

Motion dismissed.

Solicitors: *Gurdial Bakan Singh & Co.; Ramachandran & Co.*

M.Y. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. (Abdul Hamid J.) November 24, 1971]

[Kuala Lumpur — Originating Motion No. 39 of 1971]

Income Tax — Assessable income — Whether taxpayer resident in Malaya — Meaning of "resident" — Income Tax Ordinance, 1947, s. 2.

Income Tax — Case stated — When decision of Special Commissioners reviewable by High Court — Income Tax Act, 1967, Sch. 5. para. 34.

This was a case stated pursuant to paragraph 34 of Schedule 5 of the Income Tax Act, 1967, for the opinion of the High Court, whether on the facts found by the Special Commissioners of Income Tax, there was evidence to support their finding that the appellant was not resident in the States of Malaya for the years of assessment 1966 and 1967 within the meaning of the word "resident" as defined in section 2 of the Income Tax Ordinance, 1947.

The facts found by the Special Commissioners were not in dispute and accordingly appear in the judgment.

Held, dismissing the appeal: (1) in the light of the definition of the word "resident", it would appear that to be a resident in a place, an individual must first of all reside in that place. He may be absent from that place provided that such absence is temporary and reasonable and is not inconsistent with his claim to be resident in that place. This is a matter of degree for the commissioners to determine, and it is not for the court to say whether it could have reached the same conclusion. Whether a person is resident in a place has always been a question of fact and the decision of the commissioners is final unless the courts decide there was no evidence on which the commissioners could properly have come to the conclusion at which they arrived;

(2) thus, in the instant case, the Special Commissioners had all the material facts which they reviewed as a whole before arriving at a conclusion, which was not open to review by the court.

[**Editorial Note:** The Income Tax Act, 1967 is now Act 53 of the Laws of Malaysia.]

Cases referred to:-

(1) *Egyptian Delta Land and Investment Co., Ltd.* v. *Todd* [1929] A.C. 1.

(2) *de Beers Consolidated Mines* v. *Howe* [1906] A.C. 455.

(3) *Commissioner for Inland Revenue* v. *Zorab* (1926) 11 T.C. 289.

(4) *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1941) 64 C.L.R. 241.

(5) *Inland Revenue Commissioners* v. *Lysaght* [1928] A.C. 234.

(6) *Levene* v. *Inland Revenue Commissioners* [1928] A.C. 217.

(7) *Robertson* v. *Federal Commissioner of Taxation* (1937) 57 C.L.R. 147.

INCOME TAX CASE STATED.

P. Mooney for the appellants.

Nik Saghir bin Mohamed Noor (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Abdul Hamid J.: This is a case stated pursuant to paragraph 34 of Schedule 5 of the Income Tax Act, 1967 for the opinion of the High Court whether on the facts found by the Special Commissioners of Income Tax, there is evidence to support their finding that the appellant was not resident in the States of Malaya for the years of assessment 1966 and 1967 within the meaning of the word "resident" as defined in section 2 of the Income Tax Ordinance, 1947.

The facts found by the Special Commissioners are not in dispute and are as follows —

The appellant was born in India on 20th June, 1937. His father, M.O., was one of the founder partners of M.S. and Company which was established in 1900 carrying on business in Singapore, Kuala Lumpur, Penang and Ipoh. M.O. died in 1950. On his death, the appellant's mother A.B., took over his shares and became a partner. The appellant first came to this country on 19th September, 1952. His mother sent him here to study as well as to carry on the business. He went to school in the morning and stayed in the shop studying the business in the afternoon. Under an agreement dated 29th January, 1954. the business in Singapore, Kuala Lumpur, Penang and Ipoh became separate partnerships. On 2nd August, 1954. the Kuala Lumpur firm was incorporated into a limited company called M.S. & Company, Limited. The appellant's mother was a shareholder in this company. In 1956 the appellant became an assistant in the company and attended to full-time business. In 1957 he married in India.

The appellant became a shareholder of M.S. & Company, Limited on 9th May, 1958. Since April, 1959, he has been holding 67,231 shares in the company. As at 10th August, 1970 the paid-up capital of the company was $400,000 divided into 400,000 shares of $1.00 each. The appellant has been a director of the company since 27th April, 1959. He has also been a manager of the company. He is paid travelling allowance, director's allowance, manager's remuneration and dividends by the company. The manager's remuneration is paid for the periods he actually works as manager in this country. When he is in this country for a short period only, he is not paid manager's remuneration but receives director's allowance for that period. While in this country, he stays in the company's premises and eats there and is provided with free board and lodging by the company. A place of stay for the appellant is always reserved for him by the company at the company's shop premises to be used by him at any time.

All the directors of M.S. & Company, Limited who manage its business live in the shop premises. The directors are not required to hold directors' meetings at regular intervals and although they meet about once in three months, directors' meetings could be held in the absence of the appellant.

The appellant is a citizen of India. He has three children, all of whom were born in India and live in India. His wife and mother also live in India. The appellant has 15 acres of land and one house in India where his wife and children live. There are three other houses in India which he rents out.

The Special Commissioners also found that the appellant had not lived in this country continuously from 1952 to 1970 but very often returned to India and then came back to this country again. From 1952 until 24th April, 1970 (the date of the hearing) a period of 17 years and 17 months, the appellant spent in the aggregate of approximately 10¼ years in this country.

In arriving at their decision the Special Commissioners took into consideration that in 1968, the appellant's mother was seriously ill with diabetes and the appellant was asked to return to India. Since the appellant was her only son, she refused to undergo surgery unless he was by her side. In 1966 one of her toes was operated on and in 1967, her leg was amputated. She died in November, 1967. The Special Commissioners also took into account that the appellant brought his wife and children to this country only once and that was in 1968 and that they stayed in this country for six months. He has never married in this country and has no land or houses of his own here. The Special Commissioners also stated that the appellant was assessed for income tax as a non-resident for the years of assessment 1952, 1953, 1954 and 1962 and he raised no objection to these assessments. The appellant was also assessed as a non-resident for the years of assessment 1966 and 1967. The appellant has appealed against the Special Commissioners' decision. It is the appellant's contention that he was residing in this country for these years of assessment.

Mr. Mooney submitted that the fact the appellant did not object to assessments as a non-resident was irrelevant. I am entirely in agreement with the learned counsel's submission. However, I am satisfied that this was not one of the grounds upon which the Special Commissioners had based their decision. Mr. Mooney also submitted that the Special Commissioners were wrong in holding that the long absences could not be taken as temporary absences. He argued that the absences by themselves did not connote anything significant as there was nothing to indicate that the appellant had intended to be away permanently.

After considering the word "resident" as defined in the Income Tax Ordinance, 1947 as follows —

"'resident' in any place, when applied to an individual, means an individual who resides in that place except for such temporary absences therefrom as may be reasonable and not inconsistent with a claim by such individual to be resident in that place;"

the Special Commissioners expressed the view that:

"this definition is restrictive in the sense that an individual could not be taken as resident in any place if he was absent from that place and such absence was not temporary or if such absence was not reasonable and was inconsistent with his claim to be resident in that place."

It may well be that the Special Commissioners had not stated the law quite accurately, nonetheless there is nothing to show that they had misconstrued the law when applying to the facts of the present case. What the Special Commissioners, I think, had intended to say was that an individual was said to be resident in a place if he resided in that place notwithstanding the fact that there were some absences therefrom provided these absences were temporary, reasonable and not inconsistent with his claim to be resident in that place.

On the facts before them, the Special Commissioners made a finding that in 1966, the appellant was absent from the States of Malaya from 13th May to the end of that year and he continued to be absent until 16th April the following year (1967). After that long absence, the appellant was absent again from 6th of May, 1967 to 31st August, 1967. They came to the conclusion that these long absences could not be taken as temporary absences. They further concluded that in the light of the presence of his wife and children in India, he did not intend to be away from this country temporarily. Assuming the Special Commissioners were wrong in holding that the appellant had intended to be away permanently, then it was for the appellant to show that the temporary absences were in the circumstances reasonable and consistent with his claim to be resident in this country. When the Special Commissioners made a finding that the long absences could not be said to be temporary absences, the necessary inference to be drawn from this finding was that the Special Commissioners were dissatisfied that these absences were reasonable. This is a question of fact and I think the Special Commissioners were quite justified in arriving at that decision.

Referring to paragraph 4 of the Special Commissioners' grounds of decision, Mr. Mooney submitted that the Special Commissioners were under the impression that a person could only reside in one place when they said —

"... It is obvious that the appellant had no intention of establishing his residence here when his wife and children are resident in India ..."

He further submitted that the Special Commissioners misdirected themselves when they said —

"... he came to this country purely for the business of M.S. & Co., Ltd."

In my view, the decision of the Special Commissioners must be viewed as a whole. This is necessary in order to determine whether they had properly taken into consideration all the material facts before they arrived at their decision. In the present case, they stated quite clearly that after considering the whole facts of this case, they found that the appellant was not resident in the States of Malaya in 1966 and 1967.

The learned counsel contended that the Special Commissioners were wrong when they took into account the appellant's citizenship in considering residence and in holding that the appellant, due to immigration control, duly observed the requirement to keep alive his eligibility to be here for so long as it was expedient or convenient to him. He further contended that the Special Commissioners were wrong in concluding that since the appellant married in 1957, he would naturally have liked to remain in India longer than he actually did had it not been for the maximum absence from our country of one year allowed by our immigration authorities. I am inclined to agree with the learned counsel that a person's citizenship is not by itself a factor relevant in considering a person's residence [see *Egyptian Delta Land and Investment Co., Ltd.* v. *Todd*[1] and *de Beers Consolidated Mines* v. *Howe*[2]; similarly, the fact that that person's wife is residing in another country.

Mr. Mooney also submitted that the Special Commissioners had failed to take into account that the appellant had a permanent business in this country. The Special Commissioners were, I think, fully conscious of the appellant's connection in this country. It is true that Rowlatt, J. in *Commissioner for Inland Revenue* v. *Zorab*[3] at page 291 stated that —

"... a man has not got to have a residence in the shape of a building to be resident in this country .... but one has to consider not only the time that he is in this country but the nature of his visit and his connection with the country.";

nevertheless that, I think, is not the only crucial test. Williams, J. in *Koitaki Para Rubber Estates Limited* v. *The Federal Commissioner of Taxation*[4] at page 249 had this to say —

"The place of residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where he habitually lives even if this is in hotels or on a yacht or some other place of abode: See *Halsbury's* Laws of England, 2nd ed., vol. 17, pp. 376, 377.

In *Inland Revenue Commissioners* v. *Lysaght* Viscount Sumner said: 'Grammatically the word 'resident' indicates a *quality of the person charged* and is not descriptive of his property real or personal'."

In dealing with paragraph 6 of the grounds of decision, Mr. Mooney argued that the question there was whether the absences were reasonable. The Special Commissioners, he said, never considered the period of the appellant's residence here. I do not think that this is true. It seems clear that the Special Commissioners have specifically set out the periods of the appellant's presence in this country.

The learned counsel drew my attention to a passage in the judgment of Viscount Sumner in *Inland Revenue Commissioners* v. *Lysaght*,[5] where at page 243 he said —

"It is well settled that, when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review provided (a) that they had before them evidence, from which such conclusion could properly be drawn, and (b) that they did not misdirect themselves in law in any of the forms of legal error which amount to misdirection."

In this connection, I would like to refer to a passage in the judgment of Lord Buckmaster in the same case at p. 247 when he said —

"...the real question that arises in this case is whether the finding of the Commissioners that the respondent was resident and ordinarily resident in England is a finding of fact which cannot be disturbed, or whether it is open to examine the circumstances set out by the Commissioners for the purpose of seeing whether the conclusion they drew is one that this House will accept. The distinction between questions of fact and questions of law is difficult to define, but according to the respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word 'reside' or 'residence' in other Acts may have special meanings, but in the Income Tax Act, it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning.

It is, of course, true that if the circumstances found by the Commissioners in the special case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence and their prolonged or repeated repetition would certainly produce that result then the matter must be a matter of degree, and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the Commissioners and it is not for the courts to say whether they would have reached the same conclusion."

"Residence" is defined under the Income Tax Ordinance, 1947 and to use the words of Lord Buckmaster at p. 247, "...it is essentially a question of fact whether a man does or does not comply with its meaning." Thus the most important thing to do is to construe the law in the light entirely of the facts of this case. I do not therefore propose to refer to all the cases which have been cited to me by Mr. Mooney and by that I do not mean to be disrespectful to the learned counsel. In the light of the definition of the word "resident", it would appear that, to be a resident in a place, an individual must first of all reside in that place. He may be absent from that place provided that such absences are temporary and reasonable and are not inconsistent with his claim to be resident in that place. It is true that a man may have more than one residence. [See *Levene* v. *Commissioners of Inland Revenue*(6)]. However, whether a person is resident in a place has always been a question of fact and the decision of the commissioners before whom the matter came on appeal, is final unless the courts decide there was no evidence on which the Special Commissioners could properly have come to the conclusion at which they arrived. [See *Robertson* v *The Federal Commissioner of Taxation*(7)]

In the present case, whether the incidents relating to the long absences were of such a nature that they could or could not be said to be temporary absences, and, if these absences were temporary, whether the absences were of such a nature that they were or were not reasonable or consistent or inconsistent with the appellant's claim to be resident in the States of Malaya in those years of assessment is, if I may borrow the words used by Lord Buckmaster, a matter of degree and whether the degree extends so far as to constitute these absences temporary, reasonable and consistent with the appellant's claim to be resident in the States of Malaya, is for the commissioners to determine, and it is not for this court to say whether it could have reached the same conclusion.

In the instant case, it is my view that the Special Commissioners who had all the material facts before them, reviewed the facts as a whole before arriving at a conclusion. It is therefore my considered judgment that the conclusion arrived at by the Special Commissioners is not open to review by this court and for that reason, I would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

TAN KANG HWA v. SAFETY INSURANCE CO. LTD.

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.) November 27, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 36 of 1971]

Practice and Procedure — Appeal — Notice of appeal not served on plaintiff at time of filing — Second notice of appeal filed and served on plaintiff — First appeal struck out — Whether court functus officio — Federal Court (Civil Appeals) (Transitional) Rules, 1963, r. 6.

In this case the appellant had filed an appeal but at the time of filing the appeal he did not serve a notice thereof on the plaintiff. He asked the plaintiff for his consent to withdraw the appeal, but this was refused. The appellant thereupon filed a second notice of appeal and served a copy on the plaintiff. At the hearing of the appeals, the first appeal was struck out. It was then argued on behalf of the plaintiff that the court having struck out the first appeal, it was *functus officio* and had no jurisdiction to hear the second appeal. It was also argued that as the first appeal was pending, the appellant could not file the second notice of appeal without an order of the court. However it was argued that the notice of appeal should have been served on the first defendant in the case as he was "a party directly affected by the appeal".

Held: (1) the first appeal in this case had not been properly brought before the court and was a nullity and therefore the appellant could file the second notice of appeal;

(2) the first notice of appeal was not pending in this case, as it had never been served on the respondent;

(3) it was not necessary for the first defendant in this case to be served as the outcome of the appeal, whatever it may be could not make this position worse.

Cases referred to:-

(1) *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153.

(2) *In re Lamb* (1889) 23 G.B.D. 477.

(3) *Watson v. Cave, (No. 2)* (1881) 17 Ch. D. 23.

FEDERAL COURT.

David Tay for the appellant.

Edgar Joseph Jr. for the respondent.

Suffian F.J. (read by **Ong Hock Sim F.J.**): This is an appeal against a decision of the High Court.

Mr. Joseph for the respondent (plaintiff in the lower court) argues that we have no jurisdiction to hear this appeal.